

1 UNITED STATES DISTRICT COURT
2 EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION
3 UNITED STATES OF AMERICA,) Case 1:18-cr-00457
4 Plaintiff,)
5 v.) Alexandria, Virginia
6 BIJAN RAFIEKIAN,) July 12, 2019
7 Defendant.) 11:32 a.m.
8) Pages 1 - 34

9 TRANSCRIPT OF NON-PARTY MATTHEW M. NOLAN, ESQUIRE'S
10 EMERGENCY MOTION TO QUASH TRIAL SUBPOENA
11 AND OTHER MISCELLANEOUS MATTERS
12 BEFORE THE HONORABLE ANTHONY J. TRENGA
13 UNITED STATES DISTRICT COURT JUDGE
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25 COMPUTERIZED TRANSCRIPTION OF STENOGRAPHIC NOTES

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1 THE CLERK: Criminal Case 1:18-cr-457, *United*
2 *States v. Bijan Rafiekian*.

3 Counsel, will you please note your
4 appearances for the record.

5 MR. GILLIS: Good morning, Your Honor. Jim
6 Gillis, Evan Turgeon, and Katie Sweeten for the United
7 States.

8 THE COURT: Good morning.

9 MR. MACDOUGALL: Good morning, Your Honor.
10 The defendant, Mr. Rafiekian, is present in court
11 today. For Mr. Rafiekian, Mark MacDougall, Robert
12 Trout, Stacey Mitchell, and our colleague, Samantha
13 Block, will be arguing as well today.

14 THE COURT: All right. Very good.

15 MR. BRATER: Good morning, Your Honor. Randy
16 Brater and Barbara Wahl on behalf of Matt Nolan.

17 THE COURT: All right. We're here for a
18 number of miscellaneous matters. First, I want to take
19 up the motion to quash the subpoena on behalf of
20 Mr. Nolan. I'll hear from counsel.

21 MR. BRATER: Thank you, Your Honor. We're
22 here to ensure that the attorney-client privilege that
23 belongs to Mr. Nolan's former client, Mr. Alptekin, is
24 properly preserved. The privilege belongs to
25 Mr. Alptekin, and as far as we know, it has not been

1 waived. Therefore, Mr. Nolan has an ethical obligation
2 under Rule 1.6 of both the D.C. Bar and the Maryland
3 Bar where he's admitted to protect the confidences of
4 his former client.

5 So unless Mr. Alptekin waives the privilege
6 or this Court orders that Mr. Nolan must testify
7 because the privilege has been waived, Mr. Nolan must
8 maintain the privilege of his communications with his
9 prior client.

10 Now, as the Court knows, Mr. Nolan received a
11 subpoena to testify from counsel for Mr. Rafiekian that
12 was without limitation. As well, the government has
13 filed a motion to establish the crime-fraud exception
14 with respect to all of the communications between
15 Mr. Nolan and Mr. Alptekin, which the Court, we
16 understand, has deferred ruling on.

17 At this point, Mr. Nolan does not know
18 whether, A, if he would be called to testify or, if he
19 is, what potential topics might be covered in that
20 testimony. Now, we have had conversations with
21 Mr. Trout, counsel for Mr. Rafiekian, about whether
22 they plan to call Mr. Nolan or not and what might be
23 asked. Understandably, Mr. Trout explained, consistent
24 with the paper that they filed last night, they do not
25 know whether Mr. Nolan would need to be called and on

1 what topics.

2 Now, we appreciate that position because
3 Mr. Rafiekian does not know what evidence the
4 government might present in this case and whether or
5 not they may feel they need Mr. Nolan's testimony or
6 not, but that puts Mr. Nolan in a tenuous position.

7 There are a number of topics that he could be
8 asked about, many of which would be subject to
9 privilege or work product, and there may also be
10 potential hearsay objections. That is further
11 complicated by the fact that the privilege belongs to
12 Mr. Nolan's former client, Mr. Alptekin.

13 So to the extent that the Court terms that
14 there may be topics that are not privileged, not work
15 product, and not hearsay that could be covered in
16 Mr. Nolan's testimony, what we're seeking here is some
17 guidelines and ground rules for what would be the scope
18 of Mr. Nolan's testimony.

19 And in the paper that was filed last night,
20 counsel for Mr. Rafiekian proposed that the Court rule
21 on such objections on a case-by-case basis while
22 Mr. Nolan is on the stand. That would be very
23 difficult for Mr. Nolan because his former client
24 likely won't be present in the courtroom to assert the
25 privilege, and Mr. Nolan may be put in the position to

1 both act as a witness and as his own lawyer while he's
2 testifying.

3 And plus -- and I'm sure we can work
4 something out with this -- if Mr. Nolan is going to be
5 called to testify, we would like some reasonable amount
6 of advance notice so that he can work within his
7 schedule to get here.

8 Now, the bottom line is Mr. Nolan is willing
9 to be cooperative here and testify if that is something
10 that Mr. Rafiekian's counsel believes is necessary and
11 that there is a clearly defined scope of what he might
12 have to testify about that's not privileged, not work
13 product. But if he is, again, what we're seeking are
14 some clear guidelines about what might be asked and the
15 scope of the privilege that may be waived so that he
16 could be better prepared to handle the testimony.

17 THE COURT: All right. Thank you.

18 Yes.

19 MS. BLOCK: Good afternoon, Your Honor.

20 THE COURT: Yes.

21 MS. BLOCK: We understand and are respectful
22 of Mr. Nolan's time, but we believe at this time it's
23 premature to quash the subpoena as we don't know what
24 evidence is going to be put on at trial. We can't
25 predict how we are going to need to use that evidence

1 and whether or not we're going to need Mr. Nolan's
2 time. But at the time that we realize we will need
3 him, we will give him advance notice so that he can be
4 present and be able to plan accordingly.

5 We do not take a position on the privilege.
6 We don't know what the extent of their relationship
7 was, but this is not the time to assert any privilege
8 arguments. It's at trial when there's proper context
9 to understand the evidence.

10 As this Court mentioned in its order earlier
11 this week, it's deferring any rulings on the
12 crime-fraud until trial. So at that time, Mr. Nolan or
13 his attorney may assert the attorney-client privilege.
14 But merely being an attorney is not a reason not to be
15 present in the courtroom. As they just mentioned, they
16 are willing to be present.

17 We do have some nonprivilege questions that
18 we would like to ask Mr. Nolan should certain evidence
19 come in, but we, again, cannot predict and speculate
20 about what will be admitted at trial. We would like
21 this Court to wait until trial to make any decisions
22 about the privilege when Mr. Nolan can assert it.

23 THE COURT: Well, based on what the Court has
24 been told already, as I understand it, the connection
25 between Mr. Nolan and Arent Fox and the relevant issue

1 in this case is that there was a memo, an opinion
2 letter -- which I don't believe the Court has seen --
3 that was prepared by Mr. Nolan and submitted either
4 directly or through Mr. Rafiekian to Covington and that
5 Covington had that available to it when it composed and
6 filed the FARA statement that is the basis for the
7 claim here that Mr. Rafiekian caused the filing of a
8 false FARA statement.

9 Other than the fact that Mr. Nolan prepared a
10 memo that was delivered to Covington, what possible
11 relevance would anything that transpired between
12 Mr. Nolan and Arent Fox and Mr. Alptekin have to this
13 case?

14 MS. BLOCK: Well, should the memorandum be
15 admitted, the underlying facts that -- and
16 conversations that Mr. Nolan had with Mr. Alptekin then
17 would no longer be privileged as well that pertain to
18 the subject matter of the letter. So there may be some
19 relevant questions there that we would like to question
20 Mr. Nolan about.

21 THE COURT: But if that information was not
22 conveyed to Covington -- as I understand it, the only
23 thing that was conveyed to Covington was what was in
24 the memo unless there's some evidence that there were
25 separate conversations between Covington and either

1 Mr. Alptekin or Mr. Nolan. How would anything beyond
2 the actual memo itself bear on anything that's going to
3 be tried in this case?

4 MS. BLOCK: Well, Your Honor, the
5 conversations, though, that Mr. Nolan had with
6 Mr. Alptekin when making that memorandum may relate to
7 the FARA filing and some of the issues in this case.

8 THE COURT: How would it if the only thing
9 that was conveyed to Covington is the memo?

10 MS. BLOCK: Because should the memo come in,
11 then I'm under the impression that the Fourth Circuit
12 would say that the underlying conversations that relate
13 to that subject matter would also no longer be
14 privileged.

15 THE COURT: How is that relevant? How would
16 that be relevant to the claims in this case?

17 MS. BLOCK: Sorry, Your Honor.

18 THE COURT: Go ahead.

19 MS. BLOCK: It may relate to the FARA filing.
20 It may relate -- we're not clear whether or not he
21 spoke with Mr. Rafiekian when making the memorandum.
22 So there potentially could be conversations there.
23 Again, we were not part of that transaction. When he
24 was representing Mr. Alptekin, we were not. So we
25 can't speculate.

1 THE COURT: Well, conversations between
2 Mr. Nolan and Mr. Rafiekian wouldn't, at least on their
3 face, appear to be privileged, correct?

4 MS. BLOCK: Sorry, Your Honor? Would they be
5 privileged?

6 THE COURT: Would not appear to be
7 privileged.

8 MS. BLOCK: Again, we were not part of the
9 transaction. So we don't know if there was a common
10 interest or --

11 THE COURT: All right.

12 MS. BLOCK: Thank you, Your Honor.

13 THE COURT: Mr. Gillis, do you want to say
14 something about this?

15 MR. GILLIS: Yes, please, Your Honor. As the
16 Court knows, we do have a pending motion to establish
17 the crime-fraud exception with respect to Alptekin's
18 attorney-client privileges. We are mindful of the
19 Court's opinion which we received recently. And also,
20 in light of recent developments, we are trying to
21 reassess, in some part, how we are planning to present
22 the case.

23 We do know that there were statements from
24 Mr. Nolan to the Covington lawyers about what Alptekin
25 had said to Nolan. So those were communicated in

1 addition to just this opinion letter. So the
2 government may want to speak with Mr. Nolan directly,
3 and depending upon what transpires at trial, we may
4 decide ourselves to call Mr. Nolan, especially in light
5 of the Court's ruling that what was said to him in
6 connection with the FARA filing would not be
7 privileged.

8 THE COURT: But there still has to be a
9 relevance issue.

10 MR. GILLIS: Of course, Your Honor. We would
11 have to establish that as well. But in terms of
12 whether we could speak with him or whether he could
13 testify at trial, there would certainly have to be
14 relevance to that.

15 But in light of the Court's rulings, we are
16 attempting to figure out where that may place him. I'm
17 not saying at this point that we would call him. It's
18 possible that we might call him in rebuttal depending
19 upon what's in the defendant's case. Certainly, if the
20 defense calls him, we'd want to cross-examine him with
21 some of those statements.

22 THE COURT: Right.

23 MR. GILLIS: So for those reasons
24 independently, I just wanted to advise the Court of our
25 position on that.

1 THE COURT: All right. Counsel.

2 MR. BRATER: Briefly, Your Honor. We agree
3 that there's a question of relevance here. Of course,
4 we're not familiar with all the facts that the parties
5 are dealing with in this case. But to the extent that
6 the only thing at issue here is the letter or memo that
7 we understand both parties have and there's a
8 question -- it sounds to me like no one is really sure
9 if there's anything beyond that that might be relevant.

10 We would ask the Court to quash the
11 testimony. We, of course, would be willing to accept
12 service of a subpoena if the parties decide they do
13 need Mr. Nolan's testimony, and we can work with them
14 independently in order to determine an appropriate time
15 for him to be available to testify.

16 THE COURT: All right. Anything further on
17 this?

18 MR. GILLIS: May I have one moment, Your
19 Honor?

20 THE COURT: Yes.

21 (Counsel confer.)

22 MR. GILLIS: Your Honor, I'm informed that we
23 know that there was information conveyed by Nolan
24 concerning what Alptekin had said to Covington. Up
25 until this point, we have not been able to explore that

1 pending the outcome of the Court's memorandum which
2 came out recently.

3 THE COURT: Right.

4 MR. GILLIS: So we would like to be able to
5 explore that more not only with the Covington lawyers
6 but also perhaps with Nolan himself. So those are the
7 government's interests.

8 THE COURT: All right.

9 MR. GILLIS: So we really don't know what
10 might be relevant there, but we've been precluded so
11 far, at least until very recently, from talking with
12 the Covington lawyers about that.

13 THE COURT: All right. Obviously, the Court
14 can't make any final decisions until it actually hears
15 the evidence and what's being proposed. But at least,
16 as the Court understands the case, what seems to the
17 Court to be the case is that what would be relevant is
18 what was conveyed to Covington either by way of the
19 memo or in direct conversations.

20 A substantial issue for the Court is, even
21 under those circumstances, if there were conversations
22 between the Arent Fox lawyers and Mr. Nolan and
23 Covington, whether it would be relevant what
24 Mr. Alptekin said if that wasn't, in fact, conveyed to
25 Covington.

1 So at this point, I'm not going to quash the
2 subpoena in its entirety. Mr. Nolan will still be
3 subject to subpoena to testify. I'm going to quash for
4 production, at least at this point, any documents that
5 Arent Fox or Mr. Nolan may have with respect to his
6 conversations with Mr. Alptekin subject, of course, to
7 the Court reviewing that once it hears some actual
8 evidence about what may have transpired between Arent
9 Fox and Mr. Nolan and Covington that may place him --
10 not only relevance, but make discoverable any
11 conversations that would otherwise be privileged or as
12 between Arent Fox and Mr. Alptekin.

13 All right.

14 MR. GILLIS: May I ask one further question,
15 Your Honor?

16 THE COURT: Yes.

17 MR. GILLIS: As I said, we do have a pending
18 motion with respect to the crime-fraud exception and
19 the work product issue. We believe the Court could be
20 in a position to rule with respect to Alptekin's
21 privilege in the same way that the Court handled the
22 Covington and Verderame issues. So we would ask that
23 the Court issue an order similar to the order that the
24 Court has issued already with respect to Covington and
25 Verderame.

1 THE COURT: Again, Mr. Gillis, I'm having
2 difficulty with how anything Alptekin said to -- he's
3 not being tried. Mr. Rafiekian is the only defendant
4 at this point being tried. I'm having difficulty
5 understanding how what Mr. Alptekin said to Mr. Nolan
6 or any other lawyer is relevant unless that was passed
7 on to Covington for its use in determining what to file
8 under the FARA statement.

9 MR. GILLIS: Well, Your Honor, to the extent
10 it was passed on by Nolan to Covington, that would be
11 hearsay. So we'd like to hear from Nolan directly
12 about what his client said to Nolan that caused him to
13 pass that information to --

14 THE COURT: Again, I'm not going to make any
15 rulings, but I don't understand why that has any
16 relevance. The only issue is what information
17 Covington had and relied on and used that affected the
18 filing because the whole case here is that the false
19 filing is attributed to Mr. Rafiekian.

20 MR. GILLIS: Well, Your Honor, I understand
21 the Court's ruling with respect to the preponderance of
22 the evidence standard --

23 THE COURT: Right.

24 MR. GILLIS: -- and coconspirators. However,
25 without knowing what Alptekin said to him, I submit

1 that it's reasonable to assume that there would be
2 statements made there that could be in furtherance of
3 the conspiracy, especially with respect to the
4 conspiracy to commit to make false statements. There
5 also may be evidence that Alptekin revealed to Nolan
6 concerning what the defendant said to Alptekin that was
7 passed on to Nolan.

8 THE COURT: All right.

9 MR. GILLIS: So for those reasons, we --

10 THE COURT: All right.

11 MR. GILLIS: Yes, Your Honor. Thank you.

12 THE COURT: All right. I'm not going to rule
13 beyond what I have at this point.

14 MR. GILLIS: Thank you, Your Honor.

15 THE COURT: All right. The next is
16 miscellaneous issue is pertaining to the notice of
17 correction and the effect of the decision not to call
18 Mr. Flynn.

19 Mr. Trout.

20 MR. TROUT: Thank you, Your Honor.

21 Your Honor, we think this case was broken the
22 moment that the government had Mr. Flynn sign the
23 statement of offense that they created for his guilty
24 plea in December 2017. We think it's become more of a
25 mess ever since with manipulations undertaken to

1 shoehorn innocent facts into a narrative of guilt.

2 We think we've described this case as a case
3 where the government is making it up as it goes along.
4 It's as apt a description as there is to describe where
5 we are now where the government has relabeled or seeks
6 to relabel Mr. Flynn as a coconspirator after as
7 recently as June 13 declaring unequivocally to this
8 Court that he was not a coconspirator. They label it a
9 correction of the record. It's not a correction of the
10 record. It's just a change of mind.

11 No facts exist or have been proffered to say,
12 We have discovered something that Mr. Flynn did during
13 the time of the conspiracy that we didn't know about
14 before that causes us to change our view of him and to
15 conclude that he actually was a coconspirator even when
16 we previously thought he was not.

17 There is nothing that has changed. The only
18 thing that has changed is that the government has
19 concluded that he is not credible about matters
20 relating to this case. So rather than having him
21 testify and be subject to cross-examination, they want
22 him to be a declarant where he cannot be cross-examined
23 even though he is not credible on matters relating to
24 this case.

25 Your Honor, we think it's wrong. It,

1 obviously, is not in keeping with the Court's order
2 that we be given advance notice of coconspirator
3 hearsay so that we can prepare for it. We have spent a
4 lot of time preparing for him as a witness. We have
5 spent no time preparing for him as a hearsay declarant.

6 So, Your Honor, we respectfully submit that
7 the Court should exclude all of Mr. Flynn's hearsay,
8 whether it's the single document that they attach to
9 their response or any hearsay coming from any witness
10 whatsoever.

11 Thank you.

12 THE COURT: Well, as I understand it, another
13 aspect of your motion was to dismiss the indictment
14 itself.

15 MR. TROUT: Well, it was, Your Honor.
16 Ms. Mitchell was actually going to address the issue of
17 the grand jury.

18 THE COURT: All right.

19 MR. TROUT: We're trying to divide it up so
20 that we're not all --

21 THE COURT: All right. Why don't we hear
22 from Ms. Mitchell, and then I'll let the government
23 respond to both issues.

24 MS. MITCHELL: Good morning, Your Honor --
25 oh, good afternoon. No. It's good morning still.

1 THE COURT: It's still morning.

2 MS. MITCHELL: You are correct, Your Honor.

3 We also believe that the government should produce the
4 grand jury testimony of Mr. Flynn and allow both the
5 defense and the Court to determine whether or not the
6 indictment was procured upon an irregularity that
7 operated to Mr. Kian's prejudice.

8 Your Honor is well aware of the standard. A
9 prejudice can exist where either an irregularity
10 substantially influences the decision to indict or
11 there is grave doubt that the decision to indict was
12 free from substantial influence of regularities.

13 The government points to the presumption of
14 regularity before the grand jury. That's a fundamental
15 principle with which we don't quibble, Your Honor. But
16 as with any presumption, it's rebuttable, and I think
17 we've more than reached a tipping point, Your Honor.

18 In its response, the government actually
19 demurrers on the question of whether Mr. Flynn
20 testified before the grand jury or that his testimony
21 was used in the context of the superseding indictment.
22 That's to be contrasted, Your Honor, with the e-mail
23 from them four days earlier in which they note,
24 according to Flynn's counsel, his testimony would
25 remain consistent with the facts of his plea colloquy,

1 his statement of offense, and his testimony before the
2 grand jury.

3 We do not necessarily agree with that
4 characterization. They implicitly adopt that Mr. Flynn
5 has testified.

6 As the defense has pointed out on numerous
7 occasions, Your Honor, there is little room for doubt
8 that the prosecution has proceeded only because
9 Mr. Flynn, as part of his plea agreement, was willing
10 to sign a statement of offense that essentially threw
11 in an unrelated recitation of facts related to this
12 matter. Mr. Flynn undoubtedly subsequently testified
13 in what can only be presumed to be a somewhat starring
14 role before the grand jury consistent with what the
15 government's theory of the case was, Your Honor. Now
16 they say they don't believe, based on the statements of
17 his attorney, that he would testify consistently.

18 In further support of their motion, Your
19 Honor, the government suggests that there are volumes
20 of evidence that the government has produced to the
21 defense. It's a characterization with which we
22 strenuously disagree and, actually, which has been
23 called into question by this Court. They've produced
24 volumes of material, very little of which supports the
25 government theory in this case.

1 Your Honor, we believe at this point the
2 presumption of regularity has been fairly called into
3 question. We've hit the tipping point. And at
4 minimum, a reasonable first step is to allow the
5 defense, the Court to review the testimony of Mr. Flynn
6 and depending on that, Your Honor, quite likely dismiss
7 this indictment.

8 THE COURT: All right. Mr. Gillis.

9 MR. GILLIS: Your Honor, first, I have to
10 address something that my colleagues have said both in
11 writing and now in front of this Court, that in some
12 way the government concocted a statement of facts and
13 insisted upon Flynn filing something that was concocted
14 by the government. I find that offensive. It is
15 certainly untrue, and it's unwarranted. I'll leave
16 that there.

17 As the Court is aware, we've submitted
18 volumes of evidence to support the charges in the
19 indictment. The presumption of regularity certainly
20 obtains in this case with respect to whether or not
21 Mr. Flynn testified before the grand jury. We didn't
22 implicitly adopt or deny anything. Rule 6(e) prevents
23 us from doing that, Your Honor. However, we simply
24 relayed to them factual -- as we were obliged to do, we
25 simply relayed to them factually what had been

1 conferred to us by Flynn's attorneys.

2 So there is no grounds for looking behind the
3 indictment, certainly no grounds for providing the
4 transcripts to the defense. There's no indication from
5 the defense, nor any other suggestion of irregularity
6 with respect to the superseding indictment.

7 For those reasons, Your Honor, we submit the
8 defense should not have access to those transcripts,
9 nor should the Court consider dismissal of the
10 indictment.

11 With respect to the question of Flynn being
12 considered a coconspirator, Your Honor, at the time
13 that the Court asked me the question is the government
14 alleging that Mr. Flynn was part of this conspiracy, I
15 responded we are not, Your Honor. At the time, whether
16 Mr. Flynn was or was not a coconspirator was really not
17 of terrific concern to us since we expected that he
18 would be a witness at the time and that there would be
19 no hearsay offered through him, which I believe in
20 context is how the Court's question came up. Although,
21 at the present time, I don't have the entire transcript
22 before me. But in any case, there is no prejudice to
23 the defense from our -- if it's late, our late
24 indication that Mr. Flynn is going to be regarded as a
25 coconspirator.

1 There are two operate questions, Your Honor,
2 whether the government believed that there was
3 sufficient evidence to charge Mr. Flynn as a
4 coconspirator in an indictment or other charging
5 document. That's standard within the government's
6 manual, the justice manual: Do we have a reasonable
7 good faith basis to believe that we can prove the case
8 beyond a reasonable doubt? That was not a decision
9 that was made by EDVA, Your Honor. That was a
10 decision, presumably, that was made by the special
11 counsel's office. We received the case in the state in
12 which it was, which was after Mr. Flynn had pled
13 guilty.

14 Now, as I said, we expected him to be a
15 witness at trial. Therefore, we did not expect to have
16 to enter into evidence any hearsay statements. Once we
17 made the decision that we would not be calling
18 Mr. Flynn, one document became relevant, one document
19 that the defense has had since the very beginning of
20 this case. It's Exhibit 40 which is attached to our
21 motion.

22 They certainly were aware that we would be
23 introducing that document for reasons not the least of
24 which would be the effect on the hearer. But as the
25 Court has already acknowledged, that is a legitimate

1 ground for admitting documents of this kind in this
2 case.

3 That we would argue an additional ground that
4 he is a coconspirator in the case for purposes of
5 introducing that particular document, particularly for
6 the truth of it, the substantive value rather than the
7 effect on the hearer. We would want to introduce it
8 for that purpose. To do so, we need to establish by a
9 preponderance of the evidence that Mr. Flynn was a part
10 of this conspiracy.

11 So there are really two different concerns,
12 Your Honor. It was not a concern at the time that we
13 represented to the Court that we did not regard him as
14 a coconspirator. We were not actually alleging at the
15 time that he was a part of that conspiracy. It was
16 unnecessary for us to do so. But as to whether we can
17 establish by a preponderance of the evidence for the
18 evidentiary purpose of introducing that document, which
19 they've had for months, is no prejudice that should
20 justify preventing us from offering it in that manner.

21 Your Honor, to remind the Court, yes, we did
22 have an obligation to identify the coconspirators
23 through whom we expected to introduce hearsay
24 statements under the coconspirator exception. We did
25 not identify Flynn for the same reason that I've

1 articulated. However, the Court did not require us to
2 identify the statements that would be put in through
3 those coconspirator declarants. So there, again, is no
4 real prejudice to them discovering now that we plan to
5 introduce Government's Exhibit 40 on that additional
6 grounds.

7 Also, Your Honor, we were not obliged to
8 provide them with a witness list until yesterday or the
9 day before. So they were not entitled to know whether
10 we were going to be calling Mr. Flynn or not. They
11 operated on a presumption that we were. Frankly, so
12 did we. But circumstances have changed. They are not
13 prejudiced by being told in advance that we will not be
14 calling Flynn. It gives them more time to, as they
15 said, devote to other things apart from calling
16 Mr. Flynn.

17 So for those reasons, Your Honor, we request
18 that that part of the motion be denied.

19 THE COURT: All right. Mr. Trout.

20 MR. TROUT: Yes. If I could be heard just
21 briefly, Your Honor. To be clear, of course they can
22 call who they want to. That's not our complaint. Our
23 complaint is relabeling this individual as a
24 coconspirator when they were unmistakable in telling
25 the Court last month that he was not a coconspirator.

1 I don't believe that it is appropriate for the Court --
2 excuse me -- for the government to simply on the theory
3 that we can make up who the coconspirators are as we
4 think about it or we can declare them to be
5 coconspirators or not as a matter of whim. That's just
6 not appropriate.

7 When the Court asked the government was he a
8 coconspirator and they said no, I believe that they
9 were obliged to base that on the evidence that they had
10 based on the two years that they've been working on
11 this case and the Court was entitled to accept that as
12 fact from the government.

13 Now they want to change their mind, not
14 because of anything that they've since discovered about
15 what happened during the course of the conspiracy.

16 Your Honor, I do want to make one other
17 point. The Flynn statement of offense is
18 unquestionably not accurate. It was prepared by the
19 government. They had the FARA forms to be able to
20 state it accurately. Moreover, it clearly does not
21 include material information that was included in the
22 FARA form. So in a case that is built on false
23 representations and material omissions, I think the
24 Court can appreciate why we regard that to be ironic at
25 the very least.

1 So we would probably not be quite so critical
2 of the government for this inaccuracy and its failure
3 to include material information if the government had
4 not been so harshly judgmental and accusatory in a
5 criminal case about the language that Covington &
6 Burling chose to put in this FARA form. So we think
7 that our criticism of the government on that is
8 absolutely valid and appropriate.

9 THE COURT: All right.

10 MR. TROUT: Thank you.

11 THE COURT: Ms. Mitchell.

12 MS. MITCHELL: Nothing further, Your Honor.

13 THE COURT: All right. With respect to the
14 defense's motion to dismiss the indictment, I don't
15 think that the decision by the government not to call
16 Mr. Flynn or to recharacterize his role in the
17 conspiracy in and of itself is sufficient to dismiss
18 the indictment.

19 Mr. Flynn has not disavowed what is in the
20 statement of facts. He has, through his lawyers,
21 indicated that there is context that needs to be
22 considered with what he said. But in any event, I
23 don't think at this point there's been sufficient
24 evidence that would rebut the presumption of regularity
25 before the grand jury.

1 With respect to Mr. Flynn's statement coming
2 in as a coconspirator statement, there's a couple of
3 issues that are distinct. The first is whether the
4 government is either estopped or, by way of a judicial
5 admission, prevented from changing its position that
6 Mr. Flynn went from not being a part of the conspiracy
7 to a part of the conspiracy for the purposes of
8 admitting his otherwise hearsay statement pursuant to
9 Rule 801(d)(2)(E).

10 The other issue is irrespective of whether
11 the government is estopped, whether there has been a
12 sufficient showing that would allow that hearsay
13 statement to come in under 801(d)(2)(E).

14 The Court has already ruled that the
15 government, at least up until this point, has not
16 presented sufficient information through Rule 104 to
17 establish that Mr. Rafiekian was participating in the
18 alleged conspiracies and, therefore, has not made the
19 foundational showing for the admission of any hearsay
20 statements under Rule 801(d)(2)(E). Until there's some
21 additional evidence presented, presumably at trial,
22 that lack of showing would extend to any hearsay
23 statement by Mr. Flynn irrespective of whether or not
24 the Court would allow him to be considered a
25 coconspirator.

1 So at this point, I don't know that the Court
2 needs to rule any further. If and when the government
3 presents sufficient evidence to make its foundational
4 showing, the Court can consider whether the government
5 is estopped either by way of a judicial admission or
6 inconsistent positions from offering that statement. I
7 think that resolves it at least at this point.

8 All right. Anything further that we haven't
9 dealt with?

10 MR. GILLIS: Not from the government, Your
11 Honor.

12 THE COURT: All right.

13 Yes, Mr. MacDougall.

14 MR. MACDOUGALL: Your Honor, there is one
15 matter that the Court is aware of. Before we choose a
16 jury on Monday, this is the last time we'll be before
17 the Court. So we would like to take this opportunity
18 to bring it up and put it on the record and make an
19 objection and ask for some relief. The Court is aware
20 of this matter.

21 We were just before this hearing handed a
22 statement by Mr. Turgeon by the government. It's one
23 sentence. If I may read it for purposes of the record:
24 The United States government is in possession of
25 multiple independent pieces of information relating to

1 the Turkish government's efforts to influence United
2 States policy on Turkey and Fethullah Gulen, including
3 information relating to communications, interactions,
4 and a relationship between Ekim Alptekin and Michael
5 Flynn and Ekim Alptekin's engagement of Michael Flynn
6 because of Michael Flynn's relationship with an ongoing
7 presidential campaign without any reference to the
8 defendant or FIG.

9 Now, Your Honor, as I parse that sentence, it
10 says that the government has evidence that there was a
11 separate relationship between Mr. Flynn and
12 Mr. Alptekin acting on behalf of Turkey because of
13 Flynn's relationship with a presidential campaign and
14 without reference to, which I read to be without the
15 knowledge of Mr. Rafiekian or the involvement of FIG.

16 Your Honor, it's hard to come up with a
17 rationale that that kind of evidence would not be
18 exculpatory with respect to the guilt or innocence of
19 Mr. Rafiekian. It goes right to the question of what
20 happened and what he knew and what statements were made
21 and who was making them.

22 Your Honor, this case, as Mr. Trout said very
23 clearly, was born of Michael Flynn's guilty plea.
24 Until the government concluded that Mr. Flynn was no
25 longer credible, it was classic *Giglio* if he had, as

1 this statement suggests, a secret relationship.

2 Now, Your Honor, we understand the burden the
3 Court has with regard to classified information under
4 the Classified Information Protection Act. It's a
5 difficult process just from the distance with which we
6 see it. But, Your Honor, the defense lawyers have all
7 been cleared. I've been cleared from the beginning and
8 later Mr. Trout and Ms. Mitchell. We have not seen
9 this evidence. We believe we would be cleared to see
10 this evidence. We have not been given the opportunity
11 to argue to the Court the relevance of that evidence.
12 We believe, just based on this little bit of
13 information, it quite clearly is *Brady*.

14 If Mr. Rafiekian is convicted without his
15 counsel having access to this exculpatory evidence, we
16 believe it will go right to the heart of his due
17 process and confrontation rights. So, Your Honor, we
18 would object to the government having this evidence of
19 Mr. Flynn's separate relationship with Mr. Alptekin
20 evidently involving Turkey, evidently secretly acting
21 on behalf of Turkey. We would urgently move the Court
22 to reconsider given the pendency of the trial.

23 Thank you, Your Honor.

24 THE COURT: All right. The Court will take
25 that under advisement. At this point, we're going to

1 proceed as the Court has already determined based on
2 that unclassified summary. Obviously, as the case
3 develops, the Court understands the defense's concern
4 and will continue to consider whether additional
5 disclosure of information bear on this.

6 MR. MACDOUGALL: Thank you, Your Honor.

7 THE COURT: All right. We have scheduled to
8 appear 102 jurors on Monday. Because of the size of
9 that *voir dire* panel, we're going to conduct jury
10 instructions in Courtroom 900, Judge Ellis' courtroom,
11 just for jury instruction. We'll have overflow
12 monitored in Courtroom 1000 for jury selection. Then
13 once we select a jury, we'll proceed back here into
14 this courtroom, and we'll have an overflow monitor to
15 the extent I deem it's necessary to have appropriate
16 public viewing.

17 We'll meet on Monday. We should meet here in
18 this courtroom on Monday at 9:00 before we proceed to
19 jury selection.

20 MR. GILLIS: I'm looking forward to it, Your
21 Honor. Thank you.

22 MR. MACDOUGALL: There's one other matter I
23 wanted to make the Court aware of.

24 THE COURT: Yes.

25 MR. MACDOUGALL: With the Monday start, it

1 might not be relevant. We have two witnesses who we
2 loose access to after next Thursday, after Friday. I
3 understand the Court won't be having trial on Friday if
4 we go that far.

5 THE COURT: Right.

6 MR. MACDOUGALL: We are speculating that with
7 Mr. Flynn no longer on the government's list, it may be
8 a shorter government presentation. We would expect to
9 be asking the Court and asking the government's
10 concession to allow a couple of witnesses to be heard
11 out of turn if it turns out that way.

12 THE COURT: All right. Why don't you-all
13 discuss that, and if there's something the Court needs
14 to deal with, it will.

15 MR. MACDOUGALL: All right, Your Honor.

16 THE COURT: Mr. Gillis, how long do you
17 anticipate the government's case in chief will take at
18 this point?

19 MR. GILLIS: I would expect at this point,
20 Your Honor, it would take about three to four days.

21 THE COURT: All right. Anything else?

22 MR. GILLIS: Not from us, Your Honor.

23 MR. MACDOUGALL: Not from the defense, Your
24 Honor.

25 THE COURT: All right. We'll see everybody

1 on Monday.

2 The Court will stand in recess.

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4 Time: 12:15 p.m.

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I certify that the foregoing is a true and
accurate transcription of my stenographic notes.

/s/
Rhonda F. Montgomery, CCR, RPR